as presented to WPCB at prelim adoption hrg 7-27-11

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Indiana Water Pollution Control Board
Indiana Government Center North Room 1255
100 North Senate Avenue
Indianapolis, IN 46204

Subject: Comments and Suggestions Concerning the Antidegradation Standards and Implementation Procedures Final Draft Rule, Dated May 6, 2011

Dear Board Members:

The Indiana Water Quality Coalition ("IWQC") and the Indiana Manufacturers Association ("IMA") submit the following comments and suggestions to the "Antidegradation Standards and Implementation Procedures," LSA Document #08-764, Draft Rule (Final Revisions, Dated May 6, 2011), available at http://www.in.gov/idem/files/antideg_08-764_draft_rule.doc and hereafter referred to as the "Antidegradation Rules."

The IWQC is a group of businesses with shared interests in Indiana regulations, policies, and operating procedures concerning water quality. The IMA is a voluntary, nonprofit trade association representing nearly 2,000 companies and 600,000 manufacturing jobs. Each of these entities has members or facilities in Indiana that will be considerably affected by the adoption of rules concerning antidegradation standards and implementation procedures.

The Antidegradation Rules contain several revisions to the current Indiana water quality standards and rules. Some of these revisions will result in significant changes in facility operations, and cause severe restrictions to or even prohibit new and increased discharges, which will have minimal impact on water quality. These changes will impose additional compliance costs, and could adversely affect economic growth and employment in the State. Despite these significant impacts, we believe that there will be little environmental benefit from some of the new requirements. Therefore, we urge the Board to consider, for each proposed regulatory change, whether the change is truly necessary and whether its benefits justify the resulting social and economic effects.

The comments and suggestions below highlight issues particularly important to the IWQC and IMA.

I. INTRODUCTION

The IWQC and IMA have actively participated in IDEM's antidegradation rulemaking activities since they began in the late 1990s, following the adoption of the Great Lakes system rules. The IWQC and IMA submitted detailed comments on IDEM's March 2003 first notice of rulemaking, March 2005 second notice of rulemaking, October 2008 first notice of rulemaking, and December 2009 second notice of rulemaking. These past submissions provide a complete description of our positions on each aspect of antidegradation review.

On June 16, 2011, representatives of industry and the IWQC participated in a meeting with IDEM (hereafter "the June 16, 2011 Meeting") to discuss the final draft rules. IDEM's participants included Assistant Commissioner Bruno Pigott, Assistant Commissioner David Joest, Deputy Assistant Commissioner Martha Clark Mettler, Office of Legal Counsel Attorney John Nixon, and Technical Environmental Specialist Steven Roush.

New and detailed comments are set forth below based on the final draft rule published on May 6, 2011, and comments made by IDEM during the June 16, 2011 Meeting.

II. EXECUTIVE SUMMARY

As explained below, the IWQC and IMA are concerned that the proposed Antidegradation Rules do not provide regulatory certainty, are not technically feasible, and will be difficult and expensive to implement with minimal impact on water quality. The antidegradation implementation procedures cannot be based on narrative criteria when the rules are number-driven and triggered by numeric values. The definition of "regulated pollutant" is so broad that an engineer cannot determine what is regulated and what is not. The benchmark available loading capacity should be revised to allow for consideration of all loads and flow volume from all sources at the time of each request to add or subtract a load, or IDEM should allow applicants to petition to reset the benchmark available loading capacity based upon significant changes in loads or flow rather than tying the benchmark to a single point in time forever. The scope of the information requested to apply for general permits and exemptions needs to be clarified. And, an applicant should not be required to hold a yet-to-be-defined "public meeting" before even submitting an antidegradation demonstration application. For these and other reasons, the Antidegradation Rules should be revised before being approved by the Indiana Water Pollution Control Board ("Board").

III. COMMENTS CONCERNING IDEM'S ANTIDEGRADATION RULES

1. The Antidegradation Implementation Procedures Must Be Based On Numeric Criteria.

No one disputes the Board's authority to broadly set narrative criteria, in addition to numeric criteria, to maintain or enhance water quality to provide for and fully protect designated uses of the waters of the state. However, the proposed antidegradation implementation procedures must be based only on numeric criteria, and not narrative criteria, because the procedures are tied to numeric triggers.

Numeric values trigger antidegradation review. The Antidegradation Rules are triggered when there is a "significant lowering of water quality." This term is defined under 327 IAC 2-1.3-2 (50)(A) as meaning "a new or increased loading of a regulated pollutant to a surface water of the state that results in an increase in the ambient concentration of the regulated pollutant and the increased loading is greater than a de minimis lowering of water quality. . . ." "De minimis" is defined under 327 IAC 2-1.3-4 (c)(1)(A)(i) as a "proposed net increase in the loading of a regulated pollutant . . . less than or equal to ten percent (10%) of the available loading capacity determined at the time of the specific proposed new or increased loading of the regulated pollutant." Thereafter, "available loading capacity" under 327 IAC 2-1.3-2 (2) and "benchmark available loading capacity" under 327 IAC 2-1.3-4 (c)(1)(A)(ii) and (iii) are tied to numeric values.

Narrative criteria, on the other hand, are not tied to numeric values, but rather are qualitative descriptions based upon sight or smell. Specifically, narrative water quality criteria are set forth at 327 IAC 2-1-6(a)[1] as follows:

> All surface waters . . . shall [be] free from substances, materials, floating debris, oil, or scum . . . that . . . (A) will settle to form putrescent or otherwise objectionable deposits; (B) be in amounts sufficient to be unsightly or deleterious; (C) produce (i) color; (ii) visible oil sheen; (iii) odor, or (iv) other conditions; in such degree as to create a nuisance; (D) are in concentrations or combinations that will cause or contribute to the growth of aquatic plants or algae to such a degree as to: (i) create a nuisance; (ii) be unsightly; or (iii) otherwise impair the designated uses. . . .

[1] Narrative criteria applicable to the Great Lakes are set forth at 327 IAC 2-1.5-8(a).

The problem lies in the definition of "regulated pollutant," which is defined as "any parameter for which water quality criteria have been adopted in or developed pursuant to 327 IAC 2-1 and 327 IAC 2-1.5; including narrative . . . criteria. . . ."[2] 327 IAC 2-1.3-2 (43). Numeric values can sometimes be derived to implement narrative water quality criteria.[3] However, the definition of "regulated pollutant" goes a step too far by creating a trigger for antidegradation review that includes narrative criteria for which numeric values have not been calculated.

How are regulated businesses supposed to calculate whether a pollutant or combination of pollutants will result in a discharge that will be unsightly, produce a visible oil sheen or odor, or create a nuisance to trigger the de minimis tests of less than or equal to 10% of the available loading capacity without numeric values being assigned to the narrative criteria? Quite simply, they cannot. Even IDEM recognizes this is impossible, but believes it can conquer the impossible by performing a technology or effluent guidelines review.

> ***Response:*** It is not possible to determine the loading capacity of the receiving waterbody for a pollutant that does not have a numerical water quality criterion. Therefore, it is not possible to determine if the discharge of a pollutant that does not have a numerical water quality criterion will cause a significant lowering of water quality using a numerical approach based on loading capacity and thus, no de minimis would apply. However, if the pollutant, without a water quality criterion is known or believed to be present in the discharge and it has a technology based effluent limit or if the pollutant is known to cause or contribute to a violation of

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2 The full text of 327 IAC 2-1.3-2 (43) states: "'Regulated pollutant' means any: (A) parameter: (i) for which water quality criteria have been adopted in or developed pursuant to 327 IAC 2-1 and 327 IAC 2-1.5; (ii) including: (AA) narrative and numeric criteria; and (BB) nutrients, specifically phosphorus and nitrogen; and (IV) excluding: (AA) biological criteria; (BB) pH; and (CC) dissolved oxygen; and (B) other parameter that may be limited in an NPDES permit as a result of, but not limited to: (i) best professional judgment; (ii) new source performance standards; (iii) best conventional pollutant control technology; (IV) best available technology economically achievable; or (v) best practicable control technology currently available; for the appropriate categorical guidelines of 40 CFR 400 to 40 CFR 471."

3 *See* 327 IAC 2-1.5-2 (86) defining "Tier I Criteria" an meaning "numeric values derived by use of the Tier I procedures in sections 11 and 13 through 16 of this rule that either have been adopted as numeric criteria into a water quality standard or are used to implement narrative water quality criteria," and 327 IAC 2-1.5-2 (87) defining "Tier II values" as meaning "numeric values derived by use of the Tier II procedures in sections 12 through 16 of this rule that are used to implement narrative water quality criteria." These terms were removed from the final draft rules. *See* the redlined version of 327 IAC 2-1.3-2 striking the terms, formerly at Section 2(58) and (59).

> the narrative water quality standards found in 327 IAC 2-1-6(a) or 327 IAC 2-1.5-8(b), then the pollutant will be required to be included in the antidegradation demonstration.

(Summary/Response to Comments From the Second Comment Period, available at http://www.in.gov/idem/files/wpcb_2011_jul_08-764_rtc.pdf, hereafter "Response to Comments," p. 37.)

It appears implausible, if not impossible, that a technology or effluent guidelines review of a pollutant or pollutants without numeric water quality criteria can be reviewed to determine whether a discharge will trigger the de minimis test for unsightliness, odor, or nuisance.

Basing antidegradation on narrative criteria violates Indiana Code § 13-18-3-2 (l)(1), which states that "The [antidegradation implementation] procedures . . . must include . . . a definition of significant lowering of water quality that includes a de minimis quantity of additional pollutant load: (A) for which a new or increased permit limit is required; and (B) below which antidegradation implementation procedures do not apply." A narrative criterion that cannot be numerically quantified prevents a regulated business from being able to comply with the Antidegradation Rules.

Likewise, basing antidegradation on narrative criteria violates Indiana Code § 13-18-3-2 (a), which requires compliance with I.C. § 4-22-2-19.5. Section 19.5 requires that rules be drafted in a manner to:

(1) minimize the expenses to regulated entities required to comply with the rules;
(2) achieve the regulatory goal in the least restrictive manner;
(3) avoid duplicating standards found in state or federal laws;
(4) improve ease of comprehension; and
(5) have practical enforcement.

IDEM is placing businesses in jeopardy by using narrative criteria that cannot be quantified and measured against a numeric trigger to determine de minimis status. This leads to regulatory uncertainty, could lead to arbitrary enforcement, and is simply unfair and unjust. The inclusion of narrative criteria will only increase the cost of compliance to regulated businesses, and will not achieve the regulatory goal in the least restrictive manner because it obstructs comprehension and complicates enforcement.

Finally, including narrative criteria into numeric-based antidegradation implementation procedures violates the spirit of the Barnes Report of 2007, which stressed the need for easy comprehension of regulatory obligations.

2. The Definition Of "Regulated Pollutant" Should Be Narrowed.

The definition of "regulated pollutant" at 327 IAC 2-1.3-2 (2) is too broad. Businesses should be able to determine whether they are in jeopardy of violating a regulation based upon the nature of their discharge (given their operations) and by reviewing a lookup table listing the regulated pollutants for which they are responsible. Regulatory certainty is especially important given the complex nature of the Antidegradation Rules and IDEM's intent to apply the rules to any discharger of a broadly defined "regulated pollutant" and not just NPDES permit holders.[4]

As Commissioner Easterly has explained, as of April 2007, U.S. EPA had identified 31 million organic and inorganic compounds, of which approximately 14 million were commercially available.[5] Of these, about 245,000 were being tracked or regulated by some entity.[6] While IDEM "does not anticipate trying to regulate every possible substance . . . [and claims that] there is a balancing that must occur to determine what is achievable and what is absurd" (Response to Comments, p. 74), businesses need certainty as to which pollutants are regulated. IDEM's commitment to implement the rule incorporating the use of sound scientific practices is appreciated, but fails to provide businesses the regulatory certainty they need to comply with the rules.

To achieve regulatory certainty, the IWQC and IMA propose that the definition of "regulated pollutant" be defined as "a parameter identified as a toxic substance under Section 307(a)(1) of the Clean Water Act that has an applicable or derived numeric water quality criterion and that is reasonably expected to be present in: (A) a discharge based on the source and nature of the discharge; and (B) the receiving water in sufficient amounts to have a detrimental effect on the designated or existing uses of the receiving water."[7]

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4 The IWQC and IMA commented previously that the Antidegradation Rules should apply only to persons required to apply for a NPDES permit.

5 *See* Presentation entitled "Environmental Quality Service Council—September 9, 2010, Thomas W. Easterly, P.E., DEE, QEP, Commissioner, Indiana Department of Environmental Management, p. 30, available at http://www.in.gov/idem/files/commish_pres_2010_sep_eqsc.ppt.

6 *Id.* at 31. Commissioner Easterly stated that at the cost of $20 per compound, the cost would be about $5 million per sample. *Id.* at 32.

7 Pursuant to 33 U.S.C. § 1313(B), a state shall adopt criteria for all toxic pollutants listed pursuant to section 317(a)(1) of this title for which criteria have been published under section 1314 (a) of this title, the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the state, as necessary to support such designated uses."

This modification would achieve the statutory goals of Indiana Code Section 13-18-3-2 (a) and 4-22-2-19.5. The proposed modification would minimize expenses to regulated entities required to comply with the rule, achieve the regulatory goal in a less restrictive manner, avoid duplicate standards found in other state and federal laws, improve ease of comprehension, and allow for practical enforcement.[8] And, IDEM would not have the administrative burden of reviewing the regulated community's work and independently calculating criteria for substances that have no water quality standards. In essence, to achieve regulatory certainty, the definition should cover substances for which there are numeric criteria derived and adopted following appropriate regulatory procedures.

3. The Definition Of Benchmark Available Loading Capacity Must Be Revised.

Applicants should be able to petition IDEM to reset the benchmark available loading capacity, defined at 327 IAC 2-1.3-4(c)(1)(A)(ii) and (iii), based upon significant changes in flow volume to a water body. In the prior draft of the Antidegradation Rules,[9] IDEM proposed that the benchmark unused available loading capacity for High Quality Water ("HQW") that was not an Outstanding National Resource Water ("ONRW") or Outstanding State Resource Water ("OSRW") be set at 75% of the unused available loading capacity established at the time of the request for the initial increase in the loading of a pollutant of concern. Loading capacity reflects the maximum amount of pollution a water body can tolerate without negatively affecting the water body's designated uses. In other words, for HQW where designated uses were already being met, IDEM proposed a regulatory scheme that preserved 75% of the unused loading capacity of a water body and would have allowed dischargers to use the remaining 25% of unused loading capacity. In the final draft rules, IDEM set the benchmark available loading capacity much more conservatively to preserve 90% of the unused loading capacity, meaning dischargers can use the remaining 10% of the unused loading capacity. At the same time though, IDEM has kept "de minimis" at less than or equal to 10% of the available loading capacity. *See* 327 IAC 2-1.3-4 (c)(1)(A)(i).

On July 20, 2011, IDEM Rules Development Branch Senior Environmental Manager Mary Ann Stevens distributed companion documents to the Antidegradation Rules entitled "de minimis exemption example." The example, copy attached, highlighted the problem of establishing a benchmark available loading capacity for cumulative de minimis discharges at a single point in time, without considering significant flow volume and/or load increases or decreases. In example 1, for instance,

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[8] Many other Indiana laws generally prohibit discharging contaminants into the environment, both civil (I.C. § 13-30-2-1) and criminal (I.C. § 13-30-10-1.5), and NPDES permittees are required to provide notice of certain new or increased discharges of toxic pollutants (327 IAC 5-2-9).

[9] LSA Document #08-764, 20091216-IR-32708764SNA.

the benchmark available loading capacity for cumulative de minimis discharges for a final design flow of 15 million gallons per day ("MGD") was 90% of the initial final available loading capacity. The final available loading capacity was the total loading capacity less the used loading capacity. By example 3, the benchmark available loading capacity for cumulative de minimis discharges for a final design flow of 21 MGD was only 67% of the final available loading capacity (1.52 / 2.27 = .67). Had the benchmark available loading capacity been reset for the 21 MGD final design flow, the benchmark available loading capacity would have been 2.04 (2.27 x .90 = 2.04) rather than 1.52 lbs/day. This means dischargers could only use 1.52 lbs/day of assimilative capacity, which represents only 75% of the 90% final available loading capacity of 2.04 lbs/day based on the 21 MGD flow (1.52 / 2.04 = .75). This means 25% of the available loading capacity (below a 90% benchmark based on the 6 MGD of additional flow) would go unused.

As IDEM's example demonstrated, significant changes in flow volume and/or load renders the initial benchmark available loading capacity unrepresentative of the goal of allocating 10% of the available loading capacity to dischargers. Thus, establishing a benchmark available loading capacity at a particular point to time that will forever bind future dischargers appears inappropriate and in IDEM's example over-conservative. Likewise, some businesses are undergoing conservation efforts to reduce the volume or flow of their discharges, which may render the benchmark available loading capacity unreliable or underprotective. IDEM acknowledged at the June 16, 2011 Meeting that it did not consider the effect of reduced flows from dischargers in its benchmark analysis.

For these reasons, the IWQC and IMA propose that all loads and flow volume be included in calculating the available loading capacity and benchmark available loading capacity at the time of each request to add a new or increased load. Alternatively, the rule should be revised to allow applicants to petition IDEM for resetting the benchmark available loading capacity (defined at 327 IAC 2-1.3-4(c)(a)(A)(ii) and (iii)), rather than forever tying it to the flow volume and load at the single point in time to the first request to add a new or increased loading of a regulated pollutant. In essence, setting a 2012 or 2013 benchmark available loading capacity for a water body may prove to be under- or overprotective years later if flow volumes change significantly.

4. The Information IDEM Requires For Exemptions Needs Clarification.

The IWQC and IMA are unclear about the amount of information IDEM will require in connection with an exemption. The exemptions from antidegradation demonstration requirements exist at 327 IAC 2-1.3-4 (a), (b), and (c)(2). In its Response to Comments, IDEM explained that "The concept of the exemption justification has been removed from the revised draft of the rule." (Response to

Comments, pp. 55, 78, and 91.) The IWQC and IMA agree with IDEM's statement that exempt "activities do not require further justification because (a) they are short-term, temporary, (b) they are thought to cause only a de minimis increase in pollutant loading, or (c) have already [been approved with the submission of] necessary information as part of an existing applicable permit." (Response to Comments, pp. 78 and 91.) At the June 16, 2011 Meeting, however, Assistant Commissioner Joest advised that those subject to the Antidegradation Rules may want to advise IDEM in writing that they are engaging in acts exempt under the rules. The IWQC and IMA oppose any requirement for more than simple notice advising IDEM of the activity and that it falls within the exemption.

5. The Information IDEM Requires For General Permits Needs Clarification.

The IWQC and IMA are unclear about the amount of information IDEM will require for an applicant to submit a notice of intent to be bound to a general permit. The final rules state that "[f]or activities covered by an NPDES general permit authorized by the department . . . (2) after an antidegradation review of an NPDES general permit is conducted, activities covered by that NPDES general permit are not required to undergo an additional antidegradation review." 327 IAC 2-1.3-1 (c)(2). The IWQC and IMA believe this means that holders of general permits do not have to submit information to be used in analyzing antidegradation or proving socioeconomic benefits when they apply for a general permit. But, in its Response to Comments, IDEM stated that it would "not require a social and economic analysis for either ground water remediation projects or air pollution controls." (Response to Comments, p. 88.) The specific response is set forth below:

> ***Response:*** The revised draft of the rule proposes some level of an antidegradation demonstration be completed for all discharges that constitute a significant lowering of water quality. Ground water remediation projects will have to provide some basic information about the nature and location of the discharges and information about why the discharge is necessary. Air pollution controls that generate discharges to surface water will have to provide some basic information about the nature and location of the discharges and information about why the discharge is necessary and discharge alternative analysis.

(Response to Comments, p. 88.) The IWQC and IMA are unclear about the type of information IDEM will require with an application or notice of intent to be bound to a general permit. The IWQC and IMA oppose having to supply detailed socioeconomic information as required for an antidegradation demonstration application and request

that IDEM clarify its position. The IWQC and IMA are unable to offer more specific comments to this issue until IDEM clarifies its position.

6. Public Meetings Should Not Be Required Before Submitting An Application.

IDEM's required pre-application public meeting is unprecedented and onerous. The IWQC and IMA are aware of no other regulations in the state that require an applicant to conduct a public hearing before submitting an application.

Instead, the antidegradation public participation requirement may be satisfied by providing public notice of the antidegradation demonstration application and the opportunity for the public to request a hearing. The IWQC and IMA request that 327 IAC 2-1.3-6 (c)(2) be deleted from the Antidegradation Rules. The IWQC and IMA believe that IDEM notifying the public of its receipt of an antidegradation demonstration from an applicant is sufficient. Applicants should not have to hold a public meeting before submitting an application. The Water Quality Guidance for the Great Lakes System: Supplementary Information Document (SID) states as follows:

> Opportunity for public comment is an essential element of the antidegradation decision making process and is required under Federal regulations at 40 CFR 131.12. If the tentative decision relates to an activity subject to a NPDES permit, the public participation requirements may be fulfilled by the public notice of the draft permit and fact sheet. In any event, the public notice of the tentative decision must either set forth the extent to which water quality will be significantly lowered and the basis for the tentative decision to allow the lowering, or, if analysis of the demonstration has been deferred, a tentative decision to deny the request to lower water quality pending public comment and analysis of the information obtained through antidegradation demonstration.[10]

While public participation is required under 40 C.F.R. § 131.12(a)(2), there is no mandate from federal law imposing public meetings.[11] IDEM can fulfill its public consultation obligation by meeting with advisory groups and requesting written

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[10] Water Quality Guidance for the Great Lakes System: Supplementary Information Document (SID), U.S. EPA 1995, p. 225.

[11] *See* 40 C.F.R. § 25, Public Participation In Programs Under The Resource Conservation and Recovery Act, The Safe Drinking Water Act, And The Clean Water Act.

comments, as it has thus far.[12] Additionally, public meetings are not similarly required for the issuance of a NPDES permit, especially pre-application public meetings.

If IDEM is going to require a public meeting process, it should at least have requirements similar to those already existing for other programs. The Antidegradation Rules do not even require that the 25 persons be adults or sign their request for a public meeting.[13] Requiring a regulated entity to hold a public meeting before submitting its application to IDEM is nonsensical and not required by any other state that has adopted an antidegradation rule.[14] In fact, public hearings have traditionally been held only after an application for a permit has been issued and received preliminary approval by IDEM.

Holding a hearing before even submitting an application will only add to the administrative burden and expense to regulated businesses and possibly confuse the public.[15] In fact, businesses seeking to retain a competitive edge and maintain their confidential business information and processes will not want to have to publicly disclose changes in their production process before having to submit an application to IDEM. Accordingly, the public meeting provisions do not meet the rulemaking requirements under Indiana Code § 4-22-2-19.5(a) of minimizing expenses to regulated entities required to comply with the rules, achieving the regulatory goal in the least restrictive manner, and avoiding duplication of existing standards in other state and federal laws, and should be deleted.

Worse yet, the Antidegradation Rules exhibit a punitive element that if the applicant does not hold a public meeting before it submits its antidegradation demonstration, IDEM will hold a public meeting to present the elements of the application, but "the applicant will not be afforded the opportunity to present its rationale supporting the elements of its antidegradation demonstration." 327 IAC 2-1.3-6 (c)(2)(A)(i). Indiana Code § 13-18-3-2 (l)(4) merely requires "[a] process for public input in the approval process." It does not require multiple opportunities for public input including before submission of the application. The provisions at 327 IAC 2-1.3-6(b) provide for public notice and comment and holding a public meeting if requested for a

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12 40 C.F.R. § 25.4.

13 As a comparison, the public hearing requirements for a solid waste disposal facility requires the filing of a petition signed by one hundred (100) adult individuals who reside in the county affected or own real property within one mile of the site of the proposed or existing facility. *See* I.C. § 13-15-3-3(b).

14 Antidegradation Rules, p. 38, 327 IAC 2-1.3-7(b)(3).

15 IDEM's Guide For Citizen Participation (http://www.in.gov/idem/files/cit_guide_complete.pdf) contemplates public notice after an application has been submitted so that IDEM can provide interested parties the beginning and end dates for a formal public comment period. The Guide makes no mention of pre-application public meetings.

proposed discharge to an OSRW or a public meeting is requested by at least twenty-five persons living or working within the same ten digit watershed or within fifteen miles of the proposed discharge or the commission deems it otherwise appropriate is appropriate.

Finally, the IWQC and IMA may have other objections to the pre-application public meeting process once IDEM discloses its proposed procedures.

7. The Antidegradation Rules Should Only Apply To NPDES Permit Holders.

The IWQC and IMA recommend that the Antidegradation Rules apply only to NPDES permit holders. In fact, IDEM's flowchart that accompanied its example of de minimis calculations mentioned permitting four times in the first half of the flowchart, supporting the IWQC's and IMA's position that a new or modified NPDES permit is needed before antidegradation should be triggered. We recommend that 327 IAC 2-1.3-1(b) be amended to add the phrase "that require a permit limit" to the end of that code section.

8. New Loadings Should Be Analyzed On A Pollutant-By-Pollutant Basis.

IDEM has indicated that discharges authorized by existing NPDES permits are grandfathered under the Antidegradation Rules and not subject to antidegradation review. IDEM has also indicated that if a process is changed adding a new pollutant to the discharge, the antidegradation review will concern only the new pollutant and not the previously authorized discharge. The IWQC and IMA oppose any argument that adding a new pollutant to an existing approved discharge results in a commingled discharge requiring an antidegradation analysis for each pollutant in the discharge stream, including those previously grandfathered under the rules.

9. IDEM Should Be Willing To Consider Cost And Feasibility.

At the June 16, 2011 Meeting, IDEM expressed its willingness to liberally consider costs and the feasibility of alternative discharges when reviewing affordability. The IWQC and IMA agree that affordability, trading, and extending a discharge location to another water body are all important considerations that must be taken into consideration by IDEM in performing its antidegradation determination.

10. The Definition Of Community In Section 5(g)(5) Should Be Interpreted Broadly.

The IWQC and IMA agree with IDEM's expressed willingness at the June 16, 2011 Meeting to interpret the term "community" broadly, as that term in used at 327 IAC

2-1.3-5 (g)(5) concerning impact on the community tax base. Many businesses subject to the Antidegradation Rules provide services around the state, around the country, and around the world. The positive effects of the services provided by these Indiana businesses cannot be examined only in the microcosm of the immediate location where the businesses are located.

Further, the phrase "where relevant" should be inserted at the beginning of 327 IAC 2-1.3-5 (g), rather than just Section 5(g)(5).

11. The Information IDEM Requires For Water Treatment Additives Needs Clarification.

The IWQC and IMA are unclear about how IDEM intends to regulate water treatment additives under the Antidegradation Rules. IDEM has stated that water treatment additives are considered regulated pollutants since they can cause a significant lowering of water quality and are therefore subject to the Antidegradation Rules. However, IDEM has also stated that these additives should "undergo a limited antidegradation demonstration." (Response to Comments, p. 91.) IDEM has not yet proposed what that "limited antidegradation demonstration" will include. The only thing IDEM has stated with certainty is that "The use of a new water treatment additive will require the discharger to provide some basic discharger information and information that sufficiently demonstrates that all reasonable methods for minimizing or preventing the new or increased loading have been taken." (Response to Comments, p. 97.) Proving "all reasonable methods for minimizing or preventing the new or increased loading have been taken" appears inconsistent with "a limited antidegradation demonstration." The IWQC and IMA object to such a stringent antidegradation demonstration for new water treatment additives, especially when such additives have the goal of cleaning the discharge stream in a better than existing water treatment additives or on a more cost-effective basis. The IWQC and IMA are unable to comment further without additional explanation by IDEM as to how it will review water treatment additives.

Additionally, IDEM noted at the June 16, 2011 Meeting that it did not include any water treatment additive approval cost considerations submitted by the IWQC and IMA in its fiscal analysis to the Office of Management and Budget. That analysis was provided to IDEM and should be weighed and considered.

12. Comments Concerning Other Definitions.

A. Beneficial Activities.

The IWQC and IMA appreciate IDEM's willingness to allow water quality trading within the list of beneficial activities at 327 IAC 2-1.3-5 (b).

B. Technology Demonstration

The IWQC and IMA appreciate IDEM's willingness to evaluate the language requiring a demonstration between Best Available Demonstrated Control Technology ("BADCT") and alternatives under 327 IAC 2-1.3-5 (e)(2)(C). As drafted, Section 5(e)(2)(C) raises concerns over how reliability and operational and maintenance activities would be evaluated. The IWQC and IMA believe this could reduce the advantages of BADCT and eliminate some alternatives.

C. Approved Alternative Mixing Zone

At the June 16, 2011 Meeting, IDEM expressed willingness to review the proposed definition for "approved alternative mixing zone volume for Lake Michigan" at 327 IAC 2-1.3-2 (1) because the definition of "alternative mixing zone" at 327 IAC 2-1.3-2 (2) uses the term "approved alternative mixing zone" in an apparently inconsistent manner. Section 2(2) states the "representative background loading rate is the product of the representative background concentration multiplied by the approved alternate mixing zone volume for: (i) Lake Michigan over a twenty-four (24) hour period; or (ii) the stream design flow over a twenty-four (24) hour period." The IWQC and IMA remain uncertain of the purpose of the qualifying "approved alternate mixing zone" means.

D. Mixing Zone

The IWQC and IMA recommend that the last sentence in the definition of mixing zone at 327 IAC 2-1.3.2(28) be deleted as unnecessary. The last sentence does not create any new requirement.

E. Threatened or Endangered Species

The IWQC and IMA object to the definition of "threatened or endangered species" under 327 IAC 2-1.3-2(52) because it is a moving target. An applicant should be able to review a lookup table as of a certain date and know which species are listed as threatened or endangered.

F. Whole Effluent Toxicity Testing

The IWQC and IMA agree that "whole effluent toxicity" testing at 327 IAC 2-1.3-2(59) should refer only to tests performed in accordance with approved methodologies under 40 C.F.R. Part 136. Only the methodologies of 40 C.F.R. Part 136 generate data that may property be interpreted in the context of a wastewater discharge and receiving water ecosystem.

IV. SOME PORTIONS OF THE BOARD'S PROPOSED FINAL RULE WILL NOT WITHSTAND "LOGICAL OUTGROWTH" SCRUTINY.

If the Board refuses to make some of the changes called for above, the resulting final rule will be legally vulnerable. As the Board knows, a final agency rule cannot substantially differ from the version published in the Indiana Register, "unless it is a logical outgrowth of any proposed rule as supported by any written comments submitted during the public comment period." I.C. § 4-22-2-29(b). As things currently stand, the Board's proposed final rule will not withstand a legal challenge under this standard. For example, basing antidegradation implementation procedures on narrative criteria rather than numeric criteria is substantially different than the initially promulgated rule, and this difference cannot fairly be characterized as merely a "logical outgrowth" of subsequent public comments. In particular, these rules will not withstand a "logical outgrowth" challenge because their effects on the regulated community will differ markedly from the effects that would have occurred had the initially published rule been adopted instead.

IIV. CONCLUSION

The IWQC and IMA appreciate the opportunity to provide these comments. As demonstrated above, the Antidegradation Rules should be revised to comply with the rulemaking requirements under Indiana Code § 4-22-2-19.5(a) of minimizing expenses to regulated entities required to comply with the rules, achieving the regulatory goal in the least restrictive manner, avoiding duplication of existing standards in other state and federal laws, ease of comprehension, and allowing for practical enforcement. Incorporating the IWQC and IMA's comments and suggestions set forth above will allow the Antidegradation Rules to meet these requirements.

Again, if you have any questions or comments, please contact me at wwagner@taftlaw.com or at (317) 713-3614.

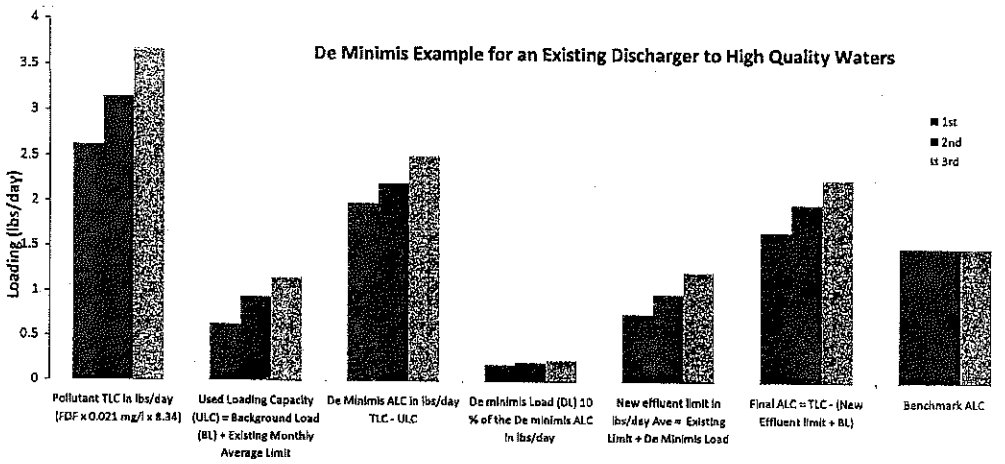
Sincerely,

William C. Wagner

Attachment
WCW/aak
1485025.1

De Minimis Example for an Existing Discharger to High Quality Waters
Tier 2 Value
Existing Discharger Expansions

Expansions	1	2	3
New Pollutant Chronic Aquatic Life Criterion = 0.021 mg/l			
Background Concentration = 0.002 mg/l			
Discharger Existing Design Flow (EDF) in MGD	2	5	8
Discharger Proposed Design Flow (PDF) in MGD	5	8	11
Stream Design Flow (SDF) $Q_{7,10}$ in MGD	10	10	10
Final Design Flow = SDF + PDF in MGD	15	18	21
Existing Discharge Monthly Avg. NPDES Permit Limit in lbs/day	0.57	0.77	0.99
Pollutant **TLC** in lbs/day (FDF x 0.021 mg/l x 8.34)	2.63	3.15	3.68
Pollutant Background Load lbs/day **(BL)** (SDF x 0.002 mg/l x 8.34)	0.17	0.17	0.17
Used Loading Capacity **(ULC)** = Background Load (BL) + Existing Monthly Average Limit	0.64	0.94	1.16
Available Loading Capacity (ALC) = TLC - ULC **De Minimis Available Loading Capacity (ALC)** in lbs/day TLC - ULC (Existing Limit + BL)	1.99	2.21	2.52
De minimis Load (DL) 10 % of the De minimis ALC in lbs/day	0.2	0.22	0.25
New effluent limit in lbs/day Avg = Existing Limit + De Minimis Load	0.77	0.99	1.24
Final ALC = TLC - ULC (New Effluent limit + BL)	1.69	1.99	2.27
Benchmark ALC for Cumulative De minimis in lbs/day = 90% of the Initial Final ALC	1.52	1.52	1.52



This is an example of three expansions from a discharger to a stream with a design flow of 10 MGD.
The discharger expands from 2 MGD to 5 MGD to 8 MGD to 11 MGD and for each expansion the discharger has accepted the individual de minimis load increase.

Therefore, they are not required to provide an antidegradation demonstration.
By accepting the individual de minimis load increase for each expansion, the discharger has not reduced the remaining final Available Loading Capacity (ALC) below the Benchmark Loading Capacity. In fact, the final ALC has increased with every discharge expansion.
The dilution ratio went down as the Total and Available Loading Capacities went up because the final design flow also went up and the individual de minimis loads did not use enough of the Available Loading Capacity to reduce the ALC below the Benchmark Loading Capacity.

8.34 refers to pounds of water per gallon of water. It is a rounded off standard conversion factor used to calculate the pounds per day values.
Flow in MGD x concentration in mg/l (parts per million) x 8.34 = pounds per day.

as presented at 1st pub hrg for prelim adoption antideg 7-27-11 rec'd via e-mail 7-28-11

SIERRA CLUB
FOUNDED 1892

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Statement of Bowden Quinn, conservation program coordinator, Sierra Club Hoosier Chapter
Endorsed by Nicole Kamins Barker, executive director, Save the Dunes Council

The Hoosier Chapter of the Sierra Club urges the Water Pollution Control Board to preliminarily adopt the proposed antidegradation rule. While the rule isn't perfect, it is a good attempt to address the many competing interests at stake in this complicated area of the Clean Water Act. We thank the Office of Water Quality, and in particular Martha Clark Mettler, for persevering on the arduous journey that has brought us to this momentous point when the board can finally take action.

Fourteen years after the adoption of antidegradation implementation procedures for the Great Lakes, we are finally nearing the time when all of the state's water bodies will have this protection. I particularly want to thank IDEM for the effort it has made in 327 IAC 2-1.3-7 to ensure that applicant-funded water quality improvement projects in Outstanding State Resource Waters will actually result in overall improvement in water quality by requiring an applicant to submit to IDEM the same information for a funded project that it would provide if it were implementing the project itself.

I will leave most of our comments about particular parts of the rule to the lawyers who have so ably assisted us throughout this process—Albert Ettinger, Brad Klein and Jeff Hyman. However, I do want to note our objection to the exception made for mercury in the antidegradation standard for Outstanding State Resource Waters in the Great Lakes basin [327 IAC 2-1.3-3(c)(1)]. There is no scientific justification for treating mercury differently than other bioaccumulative chemicals of concern. Mercury in our waters poses a significant health threat to children. We must not try to avoid dealing with that problem just because it is difficult to resolve.

The only other specific comments I will make are about the public meeting requirements in 327 IAC 2-1.3-6. The limitation of valid requests for a public meeting to people living or working within 15 miles of a proposed discharge is arbitrary and imposes an unnecessary burden on both IDEM and the public. People from farther away who enjoy a body of water for recreational or aesthetic purposes have a legitimate interest in seeing it protected, as do people who may live more than 15 miles downstream and outside of the 10-digit watershed. Furthermore, does IDEM really want to go to the trouble of verifying the addresses and workplaces of all the people who request a meeting? Requests from 25 people, no matter where they live or work, indicates sufficient public interest in a proposed discharge to warrant a meeting.

Secondly, we disagree with the prohibition of an applicant presenting its rationale for a proposed discharge at a public meeting organized by IDEM [327 IAC 2-1.3-6(c)(2)(B)(ii) and 327 IAC 5-2-11.2(b)(3)(E)]. This provision is made to encourage applicants to hold their own meetings and we strongly support that desire. However, prohibiting applicants from presenting the rationale for a proposed discharge at an IDEM meeting penalizes the people who attend the meeting and may make conducting that meeting more difficult for IDEM as people demand information that the department is

unable to provide. It is better to retain IDEM's ability to request that information from the applicant for its meetings and leave open the option of allowing an applicant to present its rationale at the meeting. To alert applicants to the importance of these meetings and encourage them to seriously consider holding their own meetings, language could be added to 327 IAC 2-1.3-5(g)(6) specifically stating that the commissioner will consider comments made at a public meeting in making a determination on a proposed discharge.

We hope to see these changes in the rule when IDEM presents it to the board for final adoption, which we hope will be before the end of the year. There is no reason to delay this rule any longer. Many people have worked long and hard—none more so than those in the Office of Water Quality—to create a workable rule that for the most part meets the requirements of the Clean Water Act and gives our waters the protection they deserve. We ask the board to show its support for that effort by preliminarily adopting the rule.

Recd via e-mail 7-29-11

Friday, July 29, 2011

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Dear Martha, Bruno, Dave, and Steve:

Hoosier Environmental Council, Alliance for the Great Lakes, Sierra Club–Hoosier Chapter, Environmental Law & Policy Center, and the Conservation Law Center have already commented on IDEM's proposed antidegradation rule and we urge you to adopt our recommendations. We ask, however, that you also consider the comments below, which are designed to address certain drafting and technical issues that were raised by other parties at the latest Water Pollution Control Board hearing. These comments were stated to some extent at the hearing by Albert Ettinger on behalf of ELPC, HEC, and Sierra Club, but we believe it may be useful for you to see them in writing. We address five issues.

1. Rule applicable to NPDES only or more general applicability?

It appeared that some parties were concerned that the rule would be applicable beyond NPDES permits and others were concerned that it was only applicable to NPDES permits. We believe that there certainly should be rules to cover at least NPDES permits and 401 certifications, but those rules need not be in one rule package. The current draft rule appears to focus primarily on NPDES permits and, given the need to get an NPDES antidegradation permit rule completed promptly, it would probably be best to go forward with this draft as an NPDES permit rule and consider how to address 401 certifications after this rule is preliminarily adopted. This limitation on applicability could be easily accomplished

by using a phrase such as "loading or discharge subject to Section 402 of the Clean Water Act" in the first sentence of Sec. 1(b). This change would also make clear that IDEM is not seeking to regulate nonpoint agricultural stormwater under this rule, although it is hard to believe that anyone would seriously think that IDEM was seeking to do that.

2. Concerns that the rules should be limited to situations where there are "increased permit limits"

These concerns were phrased in various ways by various commenters and it is unclear exactly what some of the speakers meant. We do not believe that any changes should be made to satisfy those comments at this time.

There are a number of reasons why there might not be an existing permit limit on a given parameter, including that the permit under consideration is new, the level of pollution in the prior permit did not present a "reasonable potential" for causing or contributing to a violation of water quality standards (see 40 CFR 122.44(d)), or that the pollutant is one that has not been regulated adequately in the past. For example, because of the perceived problems of writing water quality based effluent limits (WQBELs) for pollutants for which there are no numeric criteria, phosphorus limits are often not present in Indiana permits even though phosphorus has a major impact on water quality. While it is hoped that numeric limits will be developed for phosphorus, nitrogen, and other prevalent pollutants, it is obviously unacceptable to allow the problem to become even worse while numeric standards are developed (which will certainly take time).

It must be emphasized that the focus of tier 2 antidegradation is to protect assimilative capacity so as, when possible, to keep pollution levels below the level where limits are called for by the permitting rule requiring that pollution not be allowed that would cause or contribute to a violation of water quality standards. Thus, an increased discharge that caused the total discharge to go from using 20% of the assimilative capacity to 40% of the assimilative should generally be subject to an antidegradation analysis even if a permit limit would not be required for the discharge under the WQBEL rules.

The biggest practical problem here relates to nitrogen and phosphorus pollution. There are generally no limits in Indiana permits for these pollutants even though many Indiana dischargers discharge these pollutants and these pollutants demonstrably have a very adverse effect on many Indiana waters and waters downstream from them. We would strenuously object (again) to a rule that exempted these pollutants. Particularly in view of USEPA's national priority to address nutrient pollution, we are very confident that USEPA would not approve a rule that explicitly or implicitly exempted nitrogen or phosphorus pollution.

Further, it was argued by Mr. Andes at the WPCB hearing that his clients are concerned about process changes triggering the need for an antidegradation

analysis. We believe that operational changes are already exempted by Sec. 4(c)(2) to the extent that they should be. Dischargers should not be allowed to utilize generous permit limits that did not go through any antidegradation analysis to increase the loading of pollutants beyond the levels and types anticipated when the existing permit was issued, unless the increase is de minimis.

3. Cumulative de minimis cap

Mr. Andes stated at the hearing that the federal regulation does not explicitly require a cumulative cap and that earlier drafts of the Indiana antideg rule allowed less than 90% of the existing assimilative capacity to be protected. What Mr. Andes stated is literally true but misses an important point – the federal regulation does not say anything about allowing de minimis increases at all. In *Kentucky Waterways Alliance v. Johnson*, the court stated that a cumulative cap preserving 90% of the assimilative capacity (without a showing of necessity and importance) is required under judicial holdings limiting how much new or increased loading of a pollutant could be viewed as de minimis. Since *Kentucky Waterways*, EPA has followed the decision in its approach to antidegradation rules proposed by Kentucky and other states. The cumulative limit on de minimis should be left as it is in the draft rule.

4. Agriculture

We are confident that IDEM did not wish to try, through this rule, to exercise jurisdiction over currently unregulated pollution, and we do not believe that the current draft rule is sensibly interpreted as attempting to do that. However, if still further comfort is needed, we have suggested language above for Sec. 1(b). If IDEM seeks still greater clarity on this point, the definition of "regulated pollutant" could start by stating that "'Regulated Pollutant' means "a source of pollution subject to federal or state regulatory control for any:" *and so on.*

5. Public hearing requirement

It is simply untrue that Sec. 6 of the draft rule requires any private party to hold a public hearing. We believe, however, that Sec. 6(c)(2)(B)(ii) is unlikely to prove useful and may reduce the amount of information available to the public. We believe it could be deleted now.

Thank you for your consideration.

Albert Ettinger,	counsel for Hoosier Environmental Council, Environmental Law and Policy Center and Sierra Club–Hoosier Chapter
Jeffrey Hyman,	Conservation Law Center and counsel for Alliance for the Great Lakes

rec'd via e-mail
7-28-11

INPAC

Indiana Farm Bureau®

July 27, 2011

LSA Document #08-764 (WPCB)(Antidegradation)

RE: Indiana Farm Bureau/Indiana Pork Advocacy Coalition Comments

The Indiana Pork Advocacy Coalition and Indiana Farm Bureau, Inc. appreciate the opportunity to express our thoughts and concerns on this proposed rulemaking to IDEM and the Water Pollution Control Board (WPCB) both through these joint written comments and through public testimony. We understand the complexity of the antidegradation issue and this particular rulemaking. How to address the policy on antidegradation has been fraught with uncertainty and disagreement by the majority of parties involved because of the lack of clear direction from the federal level and in the authorizing statutory language. It would appear that the concepts in the rule are based upon a rule originally used for new or increased loading of a parameter with an NPDES permit limit in the Great Lakes Basin. Molding those regulations into a rule with statewide application governing all discharges that impact water quality is an enormous undertaking. While this is a valid approach, making this a statewide focus with all of the different circumstances and conditions present can make it an extremely complex process for compliance in the future.

We respect the time, resources and effort IDEM management and staff have put toward this monumental task. However, we remain concerned that compliance with this rule will be difficult if not impossible to achieve. We offer these comments to redirect the work done so far to a more narrowed scope. Significant changes are still needed for this rule, although we do believe that it is now at least workable for facilities which discharge pollutants with a permit limit. For those who do not have an NPDES permit and NPDES permit holders with pollutants for which no numerical permit limit is set, this rule appears unworkable.

As our organizations represent the interests of Indiana agriculture, our comments in regard to limiting the scope of this rulemaking will focus on how this proposed rule, if adopted as written, would be impossible to apply to agricultural operations and any resulting discharges or runoff which they may have.

Pollutants Subject to an NPDES Permit Limit

Our overarching recommendation to IDEM and the WPCB is that this proposed rule be amended to apply only to entities applying for or who already possess an NPDES permit and only for pollutants with an NPDES permit limit. For farmers, there are two main concerns with a rule of broad applicability to "regulated pollutants." First, it is not entirely clear what would be considered a regulated pollutant. More specifically for agriculture, if nutrients are explicitly included in the definition of "regulated pollutant" but no numeric water quality criteria have been developed, how will the regulated community know how this proposed rule applies to nutrient loading? It is unclear how this proposed rule applies in regard to narrative criteria. We do believe that "regulated pollutant" is better terminology than "pollutant of concern" which was used in the previous version of this rule. However, nearly anything can be considered a pollutant so there must be some way to identify for the regulated community what is subject to the antidegradation review.

The second concern farmers have with this proposed rule is just how it will apply to agricultural activities. The issuance of NPDES permits for agricultural operations has been in a state of flux for the past several years. Following several lawsuits and subsequent rulemakings, the universe of who is required to obtain an NPDES permit for livestock and poultry production has been narrowed, but the true scope and meaning of those permits is still not certain.

With agricultural operations, there are two types of discharges: intentional and unintentional. Intentional discharges are those where the farm is operated in such a manner that it has a direct discharge to a navigable water of the US, such as through the discharge of non-contact cooling water or effluent following filtration of wastewater. Few agricultural operations actually have these types of discharges.

The more common type of discharge is that which occurs outside of the control of the farmer. Generally, discharges due to agricultural runoff are intermittent, periodic discharges during periods of very high flow due to large rainfall events that may or may not actually increase loading into a receiving water. Most normally, they are the loss of nutrients and sediment following application of fertilizer and tillage or planting. They are unwanted events, but events which are nonetheless outside of the control of the farmer. Even under ideal circumstances, there will be some loss of nutrients, such as through leaching. However, rain events can lead to greater loss of nutrients and sediments, resulting in damage to crops through lost potential of productivity and economic loss to the farmer.

These types of nutrient losses are not subject to an NPDES permit. 40 CFR 122.2 defines "discharge of a pollutant" as "...[a]ny addition of any "pollutant" or combination of pollutants to "waters of the United States" from any "point source,"...." However, at 33 USC 1362(14), the term "point source" specifically excludes "...agricultural stormwater discharges and return flows from irrigated agriculture." Thus, we may surmise and do assert that those runoff events are not to be considered for purposes of antidegradation review. Nonetheless, a literal reading of proposed 327 IAC 2-1.3-1 and 327 IAC 2-1.3-3 create concern that nonpoint sources of pollutants such as runoff from a rain event may be subject to regulation under this rule.

This rule as proposed would force discharges that only exist during very high flow into a set of parameters where the trigger for an antidegradation demonstration was originally designed to be calculated based on the lowest flow of the receiving water. When the receiving water is at its lowest flow, the chance of an agricultural discharge is at its very lowest. Agriculture simply does not fit into this regulatory mold created to govern longer term, planned discharges relating to parameters with NPDES permit limits. Further, as illustrated above, even if this proposed rule was limited in scope to NPDES permit holders, this type of nutrient loss would still not be a candidate for an antidegradation demonstration as it is not a point source discharge.

An exemption is granted at 327 IAC 2-1.3-4(c) for discharges of a regulated pollutant that represent a de minimis lowering of water quality, with an accompanying calculation to determine whether the "proposed net increase in the loading of a regulated pollutant is less than or equal to ten percent (10%) of the available loading capacity...." (327 IAC 2-1.3-4(c)(1)(A)(i)) These calculations require knowledge of the concentration of what is already in the stream, an understanding of the loading capacity for that parameter that is left for dilution into the water body and what the water quality standard is for the parameter in question. Who but an NPDES permit holder would have the ability to calculate this? Moreover, how would anyone but an NPDES permit holder with an actual point source discharge in a controlled environment know the level of the proposed new or increased loading? It would appear that the relevant information for this determination would lie solely with an existing NPDES permit holder and only for parameters with an existing NPDES permit limit.

We assume that anything above this de minimis calculation is considered a significant lowering of water quality, thus triggering the requirement for an antidegradation demonstration unless some other exemption in 2-1.3-4 applies. If this rule is to apply to all new or increased loadings, what is the standard by which loading of parameters without NPDES permit limits are to be considered de minimis? Are we to assume that a significant lowering of water quality for parameters without NPDES permit limits is reached by any discharge level above zero? Of course, that is an unworkable standard.

Some proposed discharges may well be zero. The vast majority of CAFOs seeking an NPDES permit will not discharge a single gallon of effluent from that facility. We understand from IDEM's Response to Comments From the Second Comment Period that antidegradation review will be required "If an NPDES permit is issued to a CAFO with the allowance for a discharge..." which indicates that since most CAFO NPDES permits do not authorize a discharge from the facility, no antidegradation review would be required. Under this proposed rule, similar logic would seemingly apply to CFOs, which are also designed not to discharge from the facility and thus also would not require antidegradation review.

Our major issue exists where discharges are known not to be zero, but the frequency, amounts, and locations are all unknown. This is the case with agricultural runoff caused by storm events. A "de minimis" standard of zero is completely unworkable, but there is no way to quantify the amount, time and place of a runoff of nutrients in order to attach a de minimis standard to it. Even if this were possible, the loading capacity of the receiving water in this type of situation would have almost always been drastically changed by rainfall, making the use of the low flow as the basis for the Available Loading Capacity calculation unrealistic.

There are also procedural difficulties inherent in the application of this proposed rule to discharges other than pollutants subject to an NPDES permit limit. Built into this regulatory program is a definite time to consider the antidegradation review question: at the time a new or increased loading of a pollutant with an NPDES permit limit is proposed. As noted above, the vast majority of agricultural impacts to water are through non-point source discharges as a result of a storm event. Even for those farms which have an NPDES permit, it is likely that the challenge will lie with storm events leading to an unintentional addition of a pollutant to a water rather than through any sort of proposed discharge for which a prior determination could be completed.

Again, we commend IDEM for developing a proposed rule that, with some modification, could be very effective as an implementation regulation for antidegradation statewide. Unfortunately, this is only true for parameters with NPDES permit limits. As such, the proposed rule should be amended to reflect this reality.

Exemption for Agricultural Runoff

As discussed above, the most appropriate way to make this rule functional is to limit its scope. However, if this proposed rule continues to apply to all additions of regulated pollutants to surface waters, we propose that agricultural runoff caused by a storm event should never trigger an antidegradation review.

An exemption of the type found at 327 IAC 2-1.3-4 could be created for intermittent, non-permitted discharges like agricultural runoff. If similar requirements to those listed at 327 IAC 2-1.3-4(a)(1-5) were to apply to all surface waters of the state for non-point source discharges, this proposed rule would be much less unwieldy. The factors already listed within the proposed rule fit agricultural runoff perfectly:

327 IAC 2-1.3-4(a)(1): following existing regulations and best practices both for organic and inorganic fertilizer application can minimize or prevent increased loading.

(2): Agricultural runoff is related to stormwater, making it very short term and sporadic; certainly lasting less than 365 days.

(3): There is no mechanism for certification for commercial fertilizer applicators through IDEM, although CFO operators are authorized to land apply manure in accordance with their permit and they will soon be subject to regulation by the office of the State Chemist

(4): Intermittent discharges at times of very high flow will not have a lasting impact on water quality

(5): There are no established numeric criteria for nutrients.

Given the uncertainty which would be created if this rule were to be interpreted to apply to additions of pollutants such as nutrients caused by rain events, we suggest that a clear exemption for those events be delineated.

Public Meetings

In 327 IAC 2-1.3-6(c)(2), we recommend an applicant not be prevented from presenting at a public meeting the very purpose of which is to discuss the nature of the discharge the applicant is proposing. The only entity IDEM would be restricting is also the only entity with firsthand knowledge of the nature of the discharge being proposed. Do not penalize the regulated community for not conducting a meeting that no regulation requires them to conduct.

Our experience with public meetings and hearings has been significant over the last several years with respect to the construction and regulation of livestock operations. The main complaint we have heard about those meetings is that those in opposition to a proposed permit do not believe that they received adequate information about the proposed activity. At the same time, the regulated community often feels that the information stated by the public, or the responses given by IDEM, are not factual with respect to the proposed farm. By giving the applicant the opportunity to address the public, these types of concerns would be greatly reduced.

Conclusion

Our members remain concerned about the progress of this proposed rule on antidegradation. While we all value clean water and do not want to see water quality degraded, those subject to the regulation must be subject to a rule capable of comprehension. More importantly, the rule must be one with which compliance can be achieved.

We ask that you consider these comments before adopting the rule and urge that the members of the Water Pollution Control Board not pass this rule for adoption at the present time. We appreciate the opportunity to contribute to the discussion and ask any questions on this proposed rule may be addressed to either of the undersigned.

Respectfully submitted,

Josh Trenary
Indiana Pork Advocacy Coalition

Justin T. Schneider
Indiana Farm Bureau, Inc.

Added E-mail 7-29-11

STEVENS, MARY ANN

To: CLARK METTLER, MARTHA
Subject: RE: Northwest Indiana Forum Antidegradation Comments

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From: Kay Nelson [mailto:knelson@nwiforum.org]
Sent: Friday, July 29, 2011 2:55 PM
To: Gary Powdrill; dmcwag@aol.com; CLARK METTLER, MARTHA; PIGOTT, BRUNO; ROUSE, BETSY
Subject: Northwest Indiana Forum Antidegradation Comments

Good afternoon all!

Thank you for the opportunity to provide input on the work to be completed by the joint initiative being undertaken by WPCB members David Wagner and Gary Powdrill in cooperation with IDEM staff. The points that follow are specifically tied to the need for permitting certainty that I raised during the verbal testimony portion of the WPCB meeting.

1. ***The Indiana rule language should be consistent with but not more restrictive than federal language in order to protect the global economic development for the State of Indiana.***
2. ***It is imperative that a well defined trigger as to when an antideg demonstration is required must be identified in the rule. Language in the rule must reflect this trigger and tie it to NPDES permit renewal, modification, or new application activities.***
3. ***Antideg implementation guidance must be based upon numeric criteria. Utilization of narrative criteria in the rule does not support certainty. It is understood and anticipated that additional numeric criteria will be developed over the long term, however narrative criteria is subjective and reduces permitting certainty, potentially leaving agency decisions open to judicial review.***
4. ***Much discussion was held during the work group process related to Pollutants of Concern and the proposed Regulated Pollutant language. It is imperative that the rule reflect that pollutants requiring antideg demonstration be identified as having water quality standards in regulations. The proposed language is too broad and will cause undue burden to both applicant and IDEM in a demonstration process.***
5. ***I concur with the presenters who commented upon the need to revise the benchmark available loading capacity language. The 90% preservation figure, in comparison to earlier draft rule versions of 75% preservation, is more restrictive than other state antideg implementation procedures. Additionally the determination of an initial benchmark available loading capacity to be used going forward has the potential to significantly hamper and/or preclude the agency from permitting future new and/or expanded operations (economic development).***
6. ***Public participation: it is understood by all stakeholders that dialogue concerning permit modifications and related supporting documentation is necessary. However, the requirement for applicants to host a meeting on their antideg demonstration material prior to official application should be removed from the draft rule.***

The Northwest Indiana Forum looks forward to reviewing the modifications the WPCB and IDEM will make to the draft rule and provide formal comments during the 3rd notice public comment period. Again, thank you for your efforts to move this challenging rulemaking process forward.

Kay L. Nelson
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Rec'd via e-mail 7-29-11

STEVENS, MARY ANN

To: CLARK METTLER, MARTHA
ubject: RE: Antideg Issues

From: Andes, Fredric [mailto:Fredric.Andes@btlaw.com]
Sent: Friday, July 29, 2011 5:06 PM
To: CLARK METTLER, MARTHA
Subject: Antideg Issues

Martha: Here are my thoughts as to key issues that need to be addressed in the antideg proposed rules. If you have any questions, please feel free to call. Thanks.

1. Trigger for antideg review: Antideg review should only be required if a new or increased discharge that requires a new or increased limit will cause a significant lowering of water quality. Otherwise, changes that are within the facility's permit limits will require antideg review.

2. "90% unused" cap: This provision results in any increase in loading, no matter how small, requiring antideg review after the first 10% of loading capacity in the waterbody has been used, That is unreasonable and should be revised. I would suggest that the cap be changed to 50% instead of 90%. This is more conservative than what EPA specified in the GLI rules and guidance.

3. Exemptions: The situations specified in Section 5(b), such as changes related to CSO controls and waste site cleanups, should not require any antideg demonstration. In those cases, the action has already gone through agency review, and there is clear environmental and social benefit.

4. Watersheds: The NGOs expressed a concern about several provisions (I think that they were Sections 5(b)(1) and (b)(5)) that are focused on actions occuring in the same 10-digit watershed. I understand the concern, and I think that it uld be addressed, while retaining the basic functions of those provisions, by using the term "waterbody" instead.

5. Mercury: The NGOs also expressed a concern about how mercury is addressed for OSRWs in the Great Lakes basin. I think that the proposed provisions are legally valid, but I think that a clarification would be helpful. Rather than the current language, I think that it would be better to provide that if a BCC discharge to an OSRW in the Great Lakes basin is subject to a variance (individual or streamlined), then an increase that is more than de minimis could occur, if an antideg demonstration is applied for and approved.

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July 29, 2011

Ms. Martha Clark Mettler
Deputy Assistant Commissioner
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Re: Draft IDEM Antidegradation Standards and Implementation Procedures (327 IAC 2-1.3) proposed by IDEM on May 9, 2011

Dear Ms. Mettler:

As a follow-up to the Water Pollution Control Board hearing of July 27, 2011 a number of concerns were identified relative to the Draft IDEM antidegradation proposal that Duke Energy Indiana believes warrant further comment and evaluation. Below are our key issues which we encourage the IDEM and Board to consider at this point in the Board's deliberations.

Applicability of Antidegradation Implementation Procedures – 327 IAC 2-1.3-1(b). The proposed changes to this draft provision are vague and unclear. It is critical that the trigger for applicability of the antidegradation implementation procedures be clear and understandable. The revised trigger appears to be "a new or increased loading of a regulated pollutant . . . that will result from a deliberate action . . . ." This provision of the revised draft would potentially open applicability of the antidegradation review procedures to a much broader spectrum of actions than if applicability were limited to those actions that require a new NPDES permit or a modification to an existing permit, as we believe it should. **Duke Energy requests that this section of the draft rule be revised as shown in the Appendix to these comments to improve clarity and provide an appropriate basis of applicability of the antidegradation procedures.**

Available Loading Capacity and Total Loading Capacity – 327 IAC 2-1.3.2(2) and (53). Several revisions are needed to these definitions for improved clarity. One, both terms should be expressly stated to apply with respect to a regulated pollutant. Two, it is suggested that it would be better to restate the ALC definition so as to avoid using another undefined term – the "used loading capacity". Instead, the term can be described as the result of subtracting from the total loading capacity the sum of the representative background loading rate and the mass based effluent limitations for the relevant pollutant in the existing permit. Three, both definitions mistakenly, we believe, require the determination of an approved alternate mixing zone volume for any stream for which an

antidegradation review is required. This needs to be corrected. **Duke Energy requests that these definitions of the draft rule be revised as shown in the Appendix to these comments to improve clarity and simplicity of operation.**

Best Available Demonstrated Control Technology – 327 IAC 2-1.3.2(3). Duke Energy believes that this concept in the draft rule can be useful. However, we suggest that a different name be used to distinguish this term from the technology applied by standards of performance for new sources under Section 306 of the CWA. In addition, we would suggest that 327 IAC 5-5-2 cannot be used as the authority for this new technology-based requirement since section 5-5-2 refers only to technology-based effluent limitations specified by the CWA. The term being defined here is a new concept not expressly set forth in the CWA. IDEM may propose a new section in 327 IAC 5-5 to describe the technology-based requirement being defined here.

Regulated Pollutant – 327 IAC 2-1.3.2(43). To improve the clarity of this definition, it needs to be reorganized to separate references to criteria and to pollutants. Also, since it is unclear whether the term "parameter" includes "pollutant", we suggest that the phrase "or pollutant" be inserted wherever "parameter" is used within this definition. The most serious issue regarding this definition is the unacceptable vagueness created by providing that regulated pollutant may be based upon a narrative water quality criterion without providing any guidance for how that might be accomplished. Thus, a revision is needed to provide that narrative criteria can be subjected to antidegradation implementation only if a numeric value has been assigned to a pollutant or pollutants to represent the intent of the narrative criterion. Otherwise, it is not feasible to implement *de minimis* concepts, for example, or even, more fundamentally, to identify the pollutants that are implicated by the narrative criterion. **Duke Energy requests that this definition of the draft rule be revised as shown in the Appendix to these comments to improve clarity and certainty of understanding and operation of the antidegradation procedures.**

***De Minimis* Exemption – 327 IAC 2-1.3-4(c)(1)(A).** The draft rule requires that *de minimis* lowerings of water quality be constrained so as to preserve the benchmark available loading capacity, which is defined as 90% of the available loading capacity as determined at the time of the request for the initial increase in loading of a regulated pollutant to the waterbody. This limitation would set an unnecessarily severe restriction on *de minimis* lowerings of water quality and it is proposed that the benchmark available loading capacity be revised to be 50% of the available loading capacity as determined at the time of the request for the initial increase in loading. The language of this subdivision of the draft rule can be improved in clarity as well, as shown in the attached proposal.

Public Meeting Requirement – 327 IAC 2-1.3-6(c)(2). Duke Energy agrees with other commenters that this draft provision would require an unprecedented and unnecessary obligation on dischargers who are subject to the requirement for submittal of an antidegradation demonstration to conduct a public meeting on the demonstration before it is submitted to the IDEM for review. If a discharger fails to conduct such a preliminary public meeting, the discharger would be precluded from providing any explanation of the

rationale for the demonstration at a public meeting conducted by IDEM under 327 IAC 5-2-11.2. Such a preliminary public meeting would be redundant with the public meeting subsequently conducted under 327 IAC 5-2-11.2 and this requirement should be deleted from the draft rule.

Sincerely,

Daniel R Weiss

Daniel R. Weiss

Attachment

DRAFT RULE

Field Code Changed

SECTION 1. 327 IAC 2-1.3 IS ADDED TO READ AS FOLLOWS:

Rule 1.3. Antidegradation Standards and Implementation Procedures

327 IAC 2-1.3-1 Applicability of antidegradation standards and implementation procedures

Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-18
Affected: IC 13-18-3; IC 13-18-4

Sec. 1. (a) The antidegradation standards established by this rule apply to all surface waters of the state.

(b) Except as provided under section 4 of this rule, the antidegradation implementation procedures established by this rule apply to a proposed new or increased loading of a regulated pollutant to a surface water of the state from a point source that will result from ~~a~~ an intentional ~~deliberate~~ action that requires a new NPDES permit or a modification of an existing permit. ~~including a change in process or operation that:~~

~~(1) adds additional regulated pollutants; or~~

~~(2) creates an increase in loading of a regulated pollutant already being discharged~~.

Comment [A1]: This clause is confusing in that it is redundant with the phrase "new or increased loading" above that is the trigger for applicability of the antidegradation procedures.

(c) For activities covered by an NPDES general permit authorized by the department, the following apply:

(1) The department shall complete an antidegradation review of the NPDES general permits.

(2) After an antidegradation review of an NPDES general permit is conducted, activities covered by that NPDES general permit are not required to undergo an additional antidegradation review.

(Water Pollution Control Board; 327 IAC 2-1.3-1)

327 IAC 2-1.3-2 Definitions

Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-18
Affected: IC 13-11-2-265; IC 13-13-1-1; IC 13-18-1; IC 13-18-3-2; IC 14-8-2-310; IC 14-22-34; IC 36-2-3.5; IC 36-3-1

Sec. 2. The following definitions apply throughout 327 IAC 2-1, this rule, and 327 IAC 2-1.5:

(1) "Approved alternate mixing zone volume for Lake Michigan" means the volume associated with the alternate mixing zone for Lake Michigan established according to 327 IAC 5-2-11.4(b) (6) and (7).

(2) "Available loading capacity" means, with respect to a regulated pollutant, the amount of the total loading capacity for the pollutant not used by existing point source and nonpoint source discharges that is determined in accordance with ~~considering~~ the following:

(A) The available loading capacity is established at the time the request to lower water quality is considered.

(B) The available ~~used~~ loading capacity is determined by subtracting from the total loading capacity ~~shall be expressed as~~ the sum of the following two

items:

(i) the representative background loading rate over a twenty-four (24) hour period; and

(ii) the monthly average mass based effluent limitations contained in the existing permit.

(C) The representative background loading rate is the product of the representative background concentration multiplied by ~~the approved alternate mixing zone volume for~~:

(i) the volume of the approved alternate mixing zone in Lake Michigan, ~~if the proposed discharge is to Lake Michigan over a twenty-four (24) hour period~~; or

(ii) the stream design flow over a twenty-four (24) hour period.

(3) "Best available demonstrated control technology" or "BADCT" means wastewater treatment capable of meeting the technology-based effluent limit (TBEL) ~~established by the department under 327 IAC 5-5-2~~ that represents the best cost-effective treatment technology that is readily available as established by the department under 327 IAC 5-5- on a case-by-case basis for an individual discharging facility or for a class or category of discharging facilities.

. . .

(14) "Degradation" means, for purposes of an antidegradation demonstration, the following:

(A) For an ONRW, any new or increased discharge of a regulated pollutant, except for a short-term, temporary increase as described under section 4(a) of this rule.

(B) For an HQW, including an OSRW, but excluding an ONRW, any new or increased loading of a regulated pollutant to a surface water of the state, except as exemptedprovided under section 4 of this rule, ~~to a surface water of the state~~ that results in a significant lowering of water quality for that regulated pollutant.

. . .

(24) "High quality water" or "HQW" means a waterbody, including an ONRW or OSRW, in which, on a pollutant by pollutant basis, the quality of the surface water exceeds minimum levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water. The term includes any waterbody for which the pollutant has not been detected in:

(A) the water column; or

(B) nontransient aquatic organisms;

at levels that would indicate that a water quality criterion is not being met.

. . .

(43) "Regulated pollutant" means ~~any~~:

(A) any parameter or pollutant ~~for~~ for which water quality criteria:

(i) including narrative and numeric criteria; but

(ii) excluding biological criteria;

Comment [A2]: There is no apparent reason for requiring an alternate mixing zone for a stream.

Comment [A3]: We suggest that a different name be used to distinguish this term from the technology applied by standards of performance for new sources under Section 306 of the CWA.

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Comment [A4]: 327 IAC 5-5-2 cannot be used as the authority for this new technology-based requirement since section 5-5-2 refers only to technology-based effluent limitations specified by the CWA. The term being defined here is a new concept not found expressly in the CWA. IDEM may propose a new section in 327 IAC 5-5 to describe the technology-based requirement being defined here.

Comment [A5]: It is not apparent why "discharge" is used here while "loading" is used in the following subparagraph (B).

Comment [A6]: "Pollutant" should be added here since it is not clear that "parameter" includes "pollutant".

Comment [A7]: A revision is needed, as shown below, to provide that narrative criteria can be subjected to antidegradation implementation only if a numeric value has been assigned to a pollutant to represent the intent of the narrative criterion. Otherwise, it is not feasible to implement de minimis concepts, for example, or even, more fundamentally, identify the pollutants at issue.

have been adopted in or developed pursuant to 327 IAC 2-1 or ~~and~~ 327 IAC 2-1.5, except as otherwise provided herein;

(B) the following specific pollutants:

(i) ~~(ii) including:~~

~~(AA) narrative and numeric criteria; and~~

~~(BB)~~ nutrients, specifically, phosphorus and nitrogen; ~~and~~

~~(iv) excluding:~~

~~(AA) biological criteria;~~

~~(BB) pH; and~~

~~(CC) dissolved oxygen; and;~~

(ii) but excluding:

(AA) pH; and

(BB) dissolved oxygen;

(~~C~~B) any other parameter or pollutant that may be limited in an NPDES permit as a result of, but not limited to:

(i) best professional judgment;

(ii) new source performance standards;

(iii) best conventional pollutant control technology;

(iv) best available technology economically achievable; or

(v) best practicable control technology currently available;

for the appropriate categorical guidelines of 40 C.F.R. 400 to 40 C.F.R. 471.

(D) Regardless of paragraph (A) of this definition, a "regulated pollutant" may not be based on a narrative water quality criterion unless a numeric value subject to reproducible, objective measurement has been established, through rulemaking, for a pollutant or parameter to implement the narrative criterion.

(44) "Representative background concentration" means a value based upon a data set and determined according to 327 IAC 5-2-11.4(a)(8).

. . .

(50) "Significant lowering of water quality" means ~~:~~

~~(A)~~ there is a new or increased loading of a regulated pollutant to a surface water of the state that:

(A) results in an increase in the ambient concentration of the regulated pollutant;

(B) ~~and the increased loading~~ results in more ~~is greater~~ than a *de minimis* lowering of water quality; and

(~~C~~B) is not subject to any exemption ~~none of the provisions~~ of section 4 of this rule ~~applies~~.

. . .

(53) "Total loading capacity" means ~~the expressed as a~~ mass loading rate of a regulated pollutant per twenty-four (24) hour period ~~to for a the~~ waterbody in the area where the water quality is proposed to be lowered, which is determined as ~~means~~ the product of the applicable water quality criterion for the regulated pollutant multiplied by the sum of the:

(A) existing effluent flow per twenty-four (24) hour period;

(B) proposed new or increased effluent flow per twenty-four (24) hour period; and
(C) either:
~~(approved alternate mixing zone volume for:~~
(i) the volume of the approved alternate mixing zone in Lake Michigan ~~over a twenty-four (24) hour period~~; or
(ii) the stream design flow over a twenty-four (24) hour period.

Comment [A8]: There is no apparent reason for requiring an approved alternate mixing zone in the case of a stream.

Comment [A9]: Referencing the 24-hr period here should be superfluous since the mixing zone volume is invariant with time – it is simply a volume.

. . .

327 IAC 2-1.3-4 Exemptions from the antidegradation demonstration requirements
Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-18
Affected: IC 13-11-2-24; IC 13-18-7; IC 13-23-13; IC 13-24-1; IC 13-25-5

. . .

(c) For an HQW except an ONRW, a proposed new or increased loading of a regulated pollutant described in any of ~~resulting from~~ the following subdivisions is exempt from the antidegradation demonstration requirements included in section 5 of this rule:
(1) A new or increased loading of a non-BCC that will result in ~~is a~~ *demonstrated de minimis* lowering of water quality as described ~~determined in accordance with one~~ of the following paragraphsprovisions, which must be as demonstrated~~shown by the submission of sufficient information to~~that allows ~~verification by~~ the commissioner ~~to verify the de minimis as determined according to the following~~:
(A) For regulated pollutants other than heat, the following conditions must be satisfied~~Calculation considerations according to the following~~:
(i) The proposed net increase in the loading of a regulated pollutant is less than or equal to ten percent (10%) of the available loading capacity determined at the time of the specific proposed new or increased loading of the regulated pollutant. The available loading capacity shall be established at the time of each request for a new or increased loading of a regulated pollutant.
(ii) The benchmark available loading capacity is equal to fifty ~~ninety~~ percent (50%~~90%~~) of the available loading capacity established at the time of the request for the initial increase in the loading of a regulated pollutant.
(iii) For every request after the time of the request for the initial increase in the loading of a regulated pollutant, the available loading capacity remaining after the net increase in the loading of a regulated pollutant must be greater than or equal to the benchmark available loading capacity.
(B) For heat, except for discharges to Lake Michigan, the following conditions must be satisfied:
(i) The new or increased discharge will not result in an increase in temperature in a stream or an inland lake, outside of the designated mixing zone, where applicable.
(ii) The new or increased discharge will not result in an increase in waste heat of an amount in a stream greater than the amount

determined by calculating the number of British thermal units (BTUs) required to raise the temperature of the stream design flow of the receiving stream by one (1) degree Fahrenheit.

(C) For discharges to Lake Michigan, relative to temperature and heat, the following conditions must be satisfied:

(i) The new or increased discharge will not result in an increase in temperature as allowed in 327 IAC 2-1.5-8(c)(4)(D)(iv), at the edge of an ~~a one thousand (1,000) foot~~ arc defined by a radius of one thousand (1,000) feet ~~inscribed~~ from a fixed point adjacent to the discharge.

(ii) The new or increased discharge will not result in an increase in waste heat in an amount greater than five-tenths (0.5) billion BTUs per hour.

. . .

327 IAC 2-1.3-5 Antidegradation demonstration

Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-18
Affected: IC 13-23-13; IC 13-24-1; IC 13-25-5

Sec. 5. . . .

. . .

(c) For each regulated pollutant in the proposed new or increased discharge associated with activities in subsections (b), (d), and (f), each antidegradation demonstration shall include the following ~~necessary~~ information to establish that the proposed new or increased discharge is necessary:

(1) The availability, reliability, cost-effectiveness, and technical feasibility of the following:

(A) Nondegradation.

(B) Minimal degradation.

(C) Degradation mitigation techniques or alternatives.

Comment [A10]: This term is not defined but needs to be.

. . .

rec'd via e-mail 7-29-11

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July 29, 2011

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Re: Draft IDEM Antidegradation Standards and Implementation Procedures proposed by IDEM on May 9, 2011

Dear Ms. Mettler:

As a follow-up to the hearing of July 27, 2011 a number of issues were identified by the Board relative to the Draft IDEM antidegradation proposal that warranted further comment and evaluation. Although there are several details about which the Indiana Utility Group ("IUG")[1] might provide comment, among those issues that warrant specific comment at this point in the Board's deliberations are as follows: (1) trigger action for antidegradation review; (2) implementation of narrative criteria; and (3) *de minimis* impacts on loading capacity

1. **Trigger for Antidegradation Review**. As commented previously by IUG, the need to identify the appropriate point upon which antidegradation review is initiated is important because it provides clearly defined notice to the agency personnel, public and regulated community about the antidegradation program. Without clarity the program fails to accomplish its goal. The draft rule ignores the well- established legal and policy definition for permit actions of the NPDES program and instead reaches for a term "deliberate action." The draft language uses a term that more closely tracks language used in tort law as opposed to environmental law and should not be included.

IUG urges revision to the proposed rule to replace the phrase "deliberate action" in 327 IAC 2-1.3-1(b) to "a regulated activity resulting in a new or modified NPDES permit."

[1]The IUG's members include the 14 electric and gas utility members of the Indiana Energy Association as well as Dominion State Line Energy, Indiana Kentucky Electric Corporation, Wabash Valley Power, and Hoosier Energy REC, Inc.

2. Implementation of Narrative Criteria. The simple observation made by many commenters is the application of a narrative criteria to an implementation program that is designed to calculate impacts in terms of numbers is an impossible task, unless and until there has been promulgated a rule that converts the narrative criteria in the context of the use it is protecting into a number. Therefore, the agency must make clear in the implementation rule that the antidegradation analysis relative to narrative criteria may only be implemented upon the promulgation of a narrative standard that is converted to a numerical value(s) based upon the use being protected.

IUG urges that the definition of "regulated pollutant" be revised to read: "(43) "Regulated pollutant" means any (a) numerically expressed parameter: (i) for which water quality criteria have been adopted in or developed pursuant to 327 IAC 2-1 and 327 IAC 2-1.5: (ii) including: (AA) narrative and numeric criteria...."

3. 10% of Available Loading Capacity. IUG continues to struggle with the actual implementation of the 10% de minimis concept and the justification for the percentage. The manner in which the agency proposes to assess and manage the 10% is awkward and generates results that are questionable from the perspective of actual operations and protection of the uses. IUG urges the agency to continue to assess and will do the same. The inclusion of the very conservative preservation of 90% of the unused loading capacity as a benchmark is very prohibitive creating a presumption that the de minimis of 10% is a value that is not protective. The agency must proceed cautiously in developing a program that allows activities that do not warrant antidegradation review to proceed without unnecessary labors. Additional comments will be forthcoming on the matter.

IUG has submitted detailed written and oral comments it urges the agency to consider. As the formal rulemaking process continues, IUG will continue to work to provide meaningful comments to the agency's important efforts. IUG appreciates this additional opportunity to provide clarification and comment at this time.

Very truly yours,

Stan Pinegar

Stan Pinegar
On behalf of the Indiana Utility Group